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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 714.

RED TOP BREWING COMPANY,
Petitioner,

vs.

LEONARD HENRY GEORGE MAZZOTTI and HULL UNDERWRITERS ASSOCIATION, LTD.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

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RESPONDENTS' BRIEF IN OPPOSITION.

Petitioner (plaintiff-appellant below) prays for a writ of certiorari to review the judgment of the District Court for the Southern District of New York, reported at 107 F. Supp. 921, and affirmed by the Court of Appeals for the Second Circuit, not as yet reported.

Statement.

The District Court set aside a jury verdict and dismissed the complaint as a matter of law (R. 347) because of a breach of warranty under a contract of marine insurance pertaining to perils of ocean transportation (R. 342-6). The Court of Appeals affirmed on the same grounds (R. 356-8).

Nature of the Case.

In 1946, because the United States restricted the use of grains in brewing beer and ale, brewers resorted to substitutes. Six thousand bags of one such substitute, called manioca or cassava meal, was imported from Recife, Brazil on the SS. *Vitorialoide.* Respondents issued customary cargo marine insurance policies on that shipment, but with a modification of the inherent vice clauses (R. 297, 299) to cover deterioration *en route,* to be established by a specific certification on shipment and by Food and Drug Administration action at the end of the voyage (R. 302-3).

That modification was conditioned upon a warranty, formulated by the assured (Ex. D; R. 189-90; 326), that a certificate had issued **specifying**, among other things, *freedom from foreign matter and insects* (Ex. 2; R. 303). No such certificate existed. When the manioca arrived at New York the Food and Drug Administration condemned it because it was infested to the almost incredible extent of thirty-two insects per pound (Ex. C; R. 155, 325).

Questions Raised by the Petition.

The basic facts are not in dispute; they are, indeed documentary. The petition formulates two questions.

1. Petitioner's first assertion is that there was no breach of warranty, that two certificates satisfied the warranty.

The assured warranted that a certificate

> "issued immediately prior shipment **specifying** merchandise is clean, free of foreign matter and insects * * *" (Ex. 2; R. 303) [Emphasis added],

although at that very moment the assured had one of those certificates in its hands which specified not a single word or syllable on that subject (Ex. 7A; R. 84, 313). The other certificate (Ex. 5; R. 78-9, 311) was in effect a blank sheet of paper—until it was *altered*. Petitioner's witness testified that he *altered* the instrument by adding the words of the policy warranty, eighteen months later, at the request of "an interested party" (R. 233-4).

The judge of the District Court and all three judges on the Court of Appeals held unanimously that the warranty had been breached.

2. The second point is the non-applicability of Section 150 subdivision (2) of the New York Insurance Law to the present case, because subdivision (3) of that statute specifically excludes from its operation every marine insurance contract

> "in respect to, appertaining to or in connection with any and all risks or perils of navigation, **transit or transportation** • • • on, over or under any seas or inland waters • • • [Emphasis added],

which is an exact description of the extended coverage, namely: deterioration during "transit or transportation" of the manioca meal *en route* from Recife, Brazil to New York.

FIRST POINT.

The case presents no question of such gravity or importance as to require review by this Court.

It is understandable that the petitioner should desire another hearing, even though there is no legal conflict among the ten circuits nor with New York State or British decisions, and even though the granting of the writ would entail merely a reading of the evidence and a review of the inferences and conclusions drawn from it by both the lower courts. This Court has repeatedly and consistently declined to issue writs of certiorari in such cases. Supreme Court Rule 38 (5b); *Magnum Import Co.* v. *Coty* (1922), 262 U. S. 159, 163; *Southern Power Co.* v. *North Carolina P. S. Co.* (1924), 263 U. S. 508; *General T. P. Corporation* v. *Western Electric Co.* (1938), 304 U. S. 175, 178.

The petitioner's asserted reasons why the writ should be granted, consist of three paraphrases from Rule 38 para. 5(b):

(a) That the Court of Appeals' decision is "probably in conflict with local decisions" (*Pet. p.* 6) although no such decisions relating to petitioner's stated questions, are either cited or described;

(b) That the Court of Appeals in sanctioning the District Court's setting aside the jury's verdict and dismissing the complaint, has so far departed from accepted procedure as to call for this Court's supervision (*Pet. p.* 9) although the procedure is specifically provided for in the Federal Rules of Practice; and

(c) That the questions presented are important, and public interest is involved (*Pet. p.* 10) without mention of a single supportng fact or reason for that conclusion.

The content of the petition between the above three assertions has no relation to the unsupported generalities set forth by petitioner in its paraphrase of the words of the Rule. The substance of that part, like the rest of the petition, is merely a resume of petitioner's argument in the court below, including even factual inaccuracies.

Petitioner has been unable to point out any circumstance or feature that distinguishes the present case from the run of the mill. Respondents submit that no such distinction exists.

Conclusion.

No reason appears why this case should be reviewed by this Court more than any of the numerous cases decided by the lower courts from term to term.

The petition should be denied.

Respectfully submitted,

WALTER B. HALL,
Counsel for Respondents.

Dated New York, April 24, 1953.